Supreme Court, U.S.
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No. 00-285

In The

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (formerly known as SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 23, 2000

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QUESTIONS PRESENTED

1. Whether a property owner's lack of reasonable, investment-backed expectations, as demonstrated by thirty years of neglect of his property, is dispositive of his regulatory takings claim?

2. Whether the South Carolina Supreme Court correctly held that the denial of Petitioner's permit applications to fill two wetland lots did not effect a taking of Petitioner's property?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
REASONS FOR DENYING THE PETITION 8
CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Del Monte Dunes at Monterey, et al. v. City of Monterey, et al., 95 F.3d 1422 (9th Cir. 1996) 15

Eberle v. Dane County Board of Adjustment, 595 N.W.2d 730 (1999) 16

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) 11, 12, 13

Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993) 15

Lopes v. City of Peabody, 629 N.E.2d 1312 (Mass. 1994) 14, 15

Loveladies Harbor, Inc. v. United States, 28 F.3d 1179 (Fed. Cir. 1994) 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

McFillan v. Berkeley County Planning Commission, 190 W.Va. 458, 438 S.E.2d 801 (1993) 15

McQueen v. South Carolina Coastal Council, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998) 8, 10, 11, 14, 15, 16

Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000) 13, 14

State ex rel. Pizza v. Rezcallah et al., 84 Ohio St.3d 116, 702 N.E.2d 81 (1998) 14

Zealy v. City of Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1996) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

S. C. Code Ann. § 48-39-10 to -360 (1976 & Supp. 1999) 2

1977 Coastal Zone Management Act 2, 6

S.C. Code Ann. §§ 48-1-10 to -350 (1976) 11

Beachfront Management Act, S. C. Code Ann. § 48-39-250, et seq. (Supp. 1998) 7

S. C. Code Ann. § 48-39-290 (repealed 1990) 7

23A S.C. Code Ann. Regs. 30-12(C) (1999) 3

23A S.C. Code Ann. Regs. 30-1 to 30-21 (as amended in 1999) 2

16 U.S.C. §§ 1451-1464 (1972) 11

16 U.S.C. §§ 1531-1544 (1973) 11

28 U.S.C. § 1257(a) 1

Rivers and Harbor Act of 1899, 33 U.S.C. § 403 (1994) 11

33 U.S.C. §§ 1251-1387 (1972) 11

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 530 S.E.2d 628 (S. C. 2000) and reprinted in the Respondent's Appendix at 1. The opinion of the South Carolina Court of Appeals is reported at 496 S.E. 2d 643 (S. C. Ct. App. 1998) and reprinted in the Respondent's Appendix at 17. The final order of the South Carolina Court of Common Pleas is unreported and reprinted in the Respondent's Appendix at 39.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 17, 2000. A petition for rehearing was denied on May 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

Sam B. McQueen purchased two lots, located on man-made tidal canals, in an area known as Cherry Grove, in North Myrtle Beach, Horry County, South Carolina. McQueen purchased his lots in 1961 and 1963. These lots are located in a residential development created in the 1950's from a massive dredge and fill operation. Numerous finger canals were dredged out of salt marsh and the spoil material was used to create lots adjacent to these finger canals. R. 28. McQueen paid $2,500.00 in 1961 for the lot known as the 53rd Avenue lot and $1,700.00 in 1963 for the lot known as the 48th Avenue lot. R. 24.

Fifteen years after McQueen's initial purchase the S. C. Legislature adopted legislation generically known as the Coastal Zone Management Act. S. C. Code Ann. § 48-39-10 to -360 (1976 & Supp. 1999). That Act created the South Carolina Coastal Council, who promulgated regulations in 1977 for the management of coastal resources. These regulations prohibited the dredging, filling, or other alteration of tidal wetlands for commercial or residential development. 23A S. C. Code Ann. Regs. 30-1 to 30-21 (as amended in 1999).

McQueen was completely unaffected in 1977 by the adoption of these regulations. At the time of the adoption of these regulations McQueen's lots were entirely high ground, with an elevation and dimensions suitable for residential construction without alteration. McQueen could have constructed houses on these lots without seeking a permit from the regulatory agency.

However, the passage of time and the tidal cycle gradually affected McQueen's property.[1] The record before the S. C. Supreme Court included a report from a soil conservationist prepared for McQueen. According to this report the lot located on 48th Avenue began eroding between 1983 and 1989, and the lot on 53rd Avenue began eroding between 1974 and 1983. Importantly, this report indicates that surrounding, similarly situated property

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[1] The Honorable C. Connor, Judge, S. C. Ct. of Appeals, in her dissenting opinion, adopted the description of the agency's hearing officer. "Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, '[t]his lot, by the passage of time and tides for the past 30 years, has become unbuildable.' " Resp. App. 37.

owners began installing bulkheads to prevent erosion as early as 1968. R. 334.

The construction of a bulkhead is an allowable activity pursuant to S. C.'s coastal management scheme.[2] The purpose of a bulkhead is to stabilize a shoreline and to prevent erosion caused by the constant invasion of tidal flow. Tidal flow onto high ground reduces the elevation of the ground by gradually stripping away sediment. The bulkhead, usually constructed of timber, armors the shoreline and blocks tidal flow.

The adoption of S. C.'s coastal management regulatory scheme in 1977 did not limit McQueen's ability to use his property. Nor did it impair his ability to protect and preserve his property by constructing a bulkhead and armoring his lots. In fact, in the early 1980's, McQueen became aware of the need for a permit to erect a bulkhead on his property for erosion control, but abandoned his efforts after initial inquiries with the Coastal Council about the permitting process. R. 211.

McQueen's inaction over a thirty-year period resulted in the invasion of tidal waters well onto the boundaries of both of his lots. Both lots lost sediment, and elevation. Salt tolerant vegetation colonized on both

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[2] *See* 23A S. C. Code Ann. Regs. 30-12(C) (1999).

lots. One lot developed the characteristics of an intertidal mudflat habitat. R. 161 and 167.[3], [4]

In 1991, when McQueen finally decided to develop these lots, the lots could no longer support residential construction without the addition of truckloads of fill material. Petitioner's description of the activity for which McQueen sought permission as a "bulkhead permit" (Pet. 3) is a calculated misnomer. When McQueen finally commenced the permit application process in 1991[5], he no longer sought the construction of bulkheads on both lots

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[3] Respondent's biologist testified that the lot on 48th Avenue was densely vegetated with Borrichia and Spartina Patens, plants indicative of tidal wetland areas. The 53rd Avenue lot was, in part, devoid of vegetation but was filled with decaying marsh plants indicative of regular, frequent tidal flow.

[4] Petitioner claims that no other State or Federal agency objected to this application. In fact, the S. C. Wildlife and Marine Resources Department commented and expressed no objection "provided that the bulkhead is placed against the existing erosional scarp and landward of any wetland vegetation." R. 333. The construction proposed by McQueen violates this provision, since the bulkheads are proposed to be placed well seaward of wetland vegetation and habitat, and fill material will be utilized to destroy such vegetation and habitat.

[5] Petitioner discusses the history of McQueen's applications on page 3 of the Petition. Petitioner notes that the applications were made in 1991 and re-submitted in 1993. The handling of the 1991 applications, and the 1993 re-submittals, were not issues before the S. C. Court of Appeals and the Supreme Court. McQueen voluntarily dismissed his appeal of the 1991 decisions and consented to a re-submittal in 1993 once it was learned that the agency did not receive both of his applications. The letter cited on Page 3 of the Petition was not a directive to submit new applications, but a suggested process. R. 353.

for erosion control. Rather, he sought authorization to place fill material on both lots to make them suitable for building, and to construct bulkheads that would function as retaining walls to prevent the fill material from eroding. R. 275, 308.[6]

The activity for which he sought permission, the placement of fill material in tidal wetlands for residential construction, had been deemed illegal since 1977, fourteen years prior to his applications. During that fourteen years McQueen observed his neighbors taking measures to protect their property. During that fourteen years McQueen initiated steps to obtain permits for bulkheads, but then abandoned the process. R. 211. Judge Connor, the dissenter in the S. C. Court of Appeals, summarized McQueen's actions:

> McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to

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[6] Petitioner claims McQueen's property remains in its natural state, while his neighbors have been allowed the opportunity to improve their property. Pet. 2. McQueen's property is, gradually, reverting to its natural state, but neither McQueen, nor his neighbors, purchased property in its natural state. This property was artificially created through a massive dredge and fill operation. McQueen's neighbors improved their "unnatural" property before nature could reclaim it. McQueen ignored the warning signs indicated by the efforts of his neighbors, and waited until it was too late to preserve his property.

> protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless. Resp. App 35.

The Court of Common Pleas for Horry County and the S. C. Court of Appeals determined that McQueen had suffered a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). While there are some obvious similarities between the cases – both property owners owned two non-contiguous lots and both purchased their lots prior to the implementation of the regulatory scheme – any comparison between the two cases is superficial at best.

In 1986, David Lucas purchased two beachfront lots located on the Isle of Palms, in Charleston County, South Carolina, for the purpose of speculative development. In 1988, the South Carolina legislature adopted legislation commonly known as the Beachfront Management Act, as amendments to the 1977 Coastal Zone Management Act. The most controversial aspect of the Beachfront Management Act was its establishment of a "no-construction zone" along S. C.'s coastline. This zone encompassed approximately 30 residential beachfront lots along the

shoreline, including Lucas' two lots on the Isle of Palms, rendering them instantly useless.[7]

Lucas had no notice, or reason to know, in 1986, that the S. C. Legislature would eliminate all value and use of these lots a mere two years after his purchase. Lucas never engaged in the administrative process of seeking permit applications and administrative review. Instead, he initiated a judicial challenge to the Act once its effect on his property was ascertained.[8]

The S. C. Supreme Court recognized the differences between McQueen and Lucas.

> David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S. C. Code Ann. §§ 48-39-250, et seq. (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property.
>
> *In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground – a twenty-fold return on his initial investment. We*

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[7] *See* S. C. Code Ann. § 48-39-290 (repealed 1990). The amendments that repealed this section provided for the issuance of special permits for lots located in this no-construction zone.

[8] "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." *Lucas*, at 1009.

agree with Coastal Council that this case is distinguishable from Lucas. (emphasis added)

Resp. App. 6.

REASONS FOR DENYING THE PETITION

The South Carolina Supreme Court's decision is correct and does not conflict with the decisions of this Court, any other court of appeals, or any state court of last resort. Further review is not warranted.

1. The S. C. Supreme Court's decision is not inconsistent with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In urging this Court to grant certiorari, Petitioner focuses solely on the economic impact of the permit denial. Pet. 1, "Introduction." In fact, the appropriate focus is on the impact of a regulation. The genesis of the categorical taking rule is "[w]here the State seeks to sustain *regulation* that deprives land of all economically beneficial use." *Id.* at 1027 (emphasis added).

This distinction is important, and is overlooked by both Petitioner and by the S. C. Court of Appeals.[9] This case bears no meaningful, factual similarity to *Lucas*.

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[9] The Honorable Ralph King Anderson, Jr. found that "[r]egrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the *denial of the permit* left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding." *McQueen v. South Carolina Coastal Council*, 329 S. C. 588, 496 S.E.2d 643 (Ct. App. 1998) (emphasis added).

"The Beachfront Management Act brought Lucas's plans to an abrupt end." *Id.* at 1008. The regulatory prohibition, promulgated by the South Carolina Coastal Council in 1977 – more than a decade after McQueen purchased his property, had no economic impact on McQueen in 1977. The prohibition did not interfere with his plans to develop these lots. Hundreds of other lots in this area, created from the same dredge and fill operation, were developed, and hundreds of other similarly situated property owners realized their investment expectations, in spite of the adoption of the regulatory scheme. R. 135-136.

The categorical rule adopted in *Lucas* does not extend to McQueen. As Justice Scalia noted, "It seems to us that the property owner *necessarily expects* the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.* at 1027 (emphasis added). Justice Kennedy, in concurring with the judgment, discussed this necessary expectation.

> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. . . . The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate.
>
> . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider reasonable expectations whatever their

> source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. *Id.* at 1034-35.

Petitioner argues that the "conflict" between *McQueen* and *Lucas* is magnified because of their similarity. Petitioner finds the cases similar because both McQueen and Lucas "bought two lots of residential property", sought to use their property for "single-family residences", and both "suffered the loss of all economically beneficial use" of their property. Pet. 19. Respondent doesn't dispute these common, albeit superficial, facts.

The fundamental weakness in McQueen's position is that he was not "stopped cold" (Pet. 19), by a regulatory framework adopted after he acquired his property. The adoption of the regulatory prohibition of filling tidal wetlands did not impede McQueen, in 1977, from realizing his expectations on his two lots. The regulations did not impede McQueen for several years after their adoption. McQueen could have put his property to its highest and best use well into the 1980's. R. 335.

McQueen's property rights were unaffected when the regulatory framework was adopted. Further, S. C.'s regulatory framework is not unique. Its adoption in 1977 was part of a national awakening to the need for stronger wetland protection laws. By 1977 most states had enacted pollution control legislation and resource protection

legislation, in keeping with the incentives provided by federal legislation.[10]

McQueen should have known, after 1977, that if his property eroded and became a wetland again his uses would be restricted. More damaging to McQueen's case, however, is the fact that he possessed actual notice for several years that erosion was threatening his property. He was also on notice that there were methods available to him to protect his property, as he observed the armoring of the shoreline by his neighbors. There simply is no comparison between McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations" (Resp. App. 15), and the plight of David Lucas.

2. The S. C. Supreme Court's reliance on *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) was proper. *Good* is the only case in the body of authority cited by the Petitioner that bears any meaningful resemblance to *McQueen*. The S. C. Supreme Court relied on *Good* because "the principle it articulates applies with equal force here." Resp. App. 15. Good purchased property in the Florida Keys in 1973. At the time of purchase the property was subject to federal regulation through the Rivers and Harbors Act of 1899. After Good acquired his

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[10] *See* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1973); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1972) (leading to the adoption of a multitude of state programs designed to implement the goals of these acts); *see, e.g.* South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 to -350 (1976) (enacted as a result of these federal statutes).

property, numerous state and federal regulatory schemes evolved which ultimately led to the denial of a permit to excavate and fill salt marsh for the creation of a residential subdivision (see fn.10). Good waited seven years after purchase to commence obtaining the necessary approvals to develop the property.

On review of the Federal Court of Claims decision to grant the government's motion for summary judgment, the Court of Appeals for the Federal Circuit discussed the necessity of demonstrating reasonable, investment-backed expectations in the context of delay between time of purchase and the commencement of development.

> Reasonable, investment-backed expectations are an element of every regulatory takings case. See Loveladies Harbor, 28 F.3d at 1179. . . . *Good* at 1361.
>
> The picture emerges, then, of Appellant in 1973 acknowledging the difficulty of obtaining approval for his project, then waiting seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval. . . . While Appellant's prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied. Appellant was aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973-1980. . . . In light of the growing consciousness of and sensitivity toward environmental issues, Appellant must also have been aware that standards could change to his detriment,

and that regulatory approval could become harder to get. *Good* at 1362.

McQueen, like Good, delayed development during a time when "public concern about the environment resulted in numerous laws and regulations affecting land development." *Good* at 1362. Even more significant, McQueen, like Good, purchased property that, at a minimum, was subject to regulation by the federal government at the time of purchase through the Rivers and Harbor Act of 1899. Resp. App. 15. This single fact defeats a takings claim since it is a limitation on use that "inhere[s] in [petitioner's] title." *Lucas, Id.* at 1029. This fact, viewed in the context of McQueen's prolonged neglect of his property, demonstrates a "distinct lack of investment-backed expectations." Resp. App. 15.

3. The S. C. Supreme Court's decision is not in conflict with any decision of any other court of last resort. Petitioner cites *Palm Beach Isles Associates v. United States,* 208 F.3d 1374 (Fed. Cir. 2000). Palm Beach Isles Associates ("PBIA") acquired its property in 1956. The size of the tract acquired was 311.7 acres. The portion of the tract on which the regulatory takings claim is based is a 50.7 acre section that is described as "submerged land adjacent to wetlands." *PBIA* at 1377.

PBIA purchased submerged land, and in 1972, with the adoption of the Clean Water Act and the promulgation of the U.S. Army Corps of Engineers' regulations, PBIA lost the ability to fill this wetland area for development.

There is no indication in *Palm Beach Isles* that, after 1972, the property owner could have proceeded with its

development plans. The Clean Water Act had an immediate impact on the viability of PBIA's development plans for this 50 acre underwater tract. The S. C. Coastal Zone Management Act, however, had no immediate impact on McQueen's development plans.

There are numerous other distinctions between *Palm Beach Isles* and *McQueen*. In *Palm Beach Isles*, the property owner commenced with its development plans immediately by obtaining Corps permits within a year of purchasing the property. Much of the focus of the Court of Appeals was on determining the relevant parcel, an issue that bears no relevance to *McQueen*. The most important and fundamental distinction, however, is that *Palm Beach Isles* is far more akin to *Lucas* than *McQueen*, given the immediate impact of the adoption of the regulatory scheme on the property owner.

State ex rel. Pizza v. Rezcallah et al., 84 Ohio St.3d 116, 702 N.E.2d 81 (1998), cited by Petitioner, also bears no factual resemblance with *McQueen*. This case arose out of convictions for drug use, and efforts by the State of Ohio to require forfeiture and closure of properties occupied by the defendants.

Lopes v. City of Peabody, 629 N.E.2d 1312 (Mass. 1994) is cited by Petitioner as a case in conflict with *McQueen*. At the outset the Massachusetts Court stated that "[t]his action involves the validity of a zoning regulation and does not present a claim for damages as a result of a taking of Lopes's property." *Id.* at 1314. Additionally, Lopes purchased his property six years after the adoption of the zoning regulation. This case certainly does not

establish Petitioner's claim that the S. C. Supreme Court is in conflict with other state courts of last resort.

Petitioner considers *Del Monte Dunes at Monterey, et al. v. City of Monterey, et al.*, 95 F.3d 1422 (9th Cir. 1996) to be a case in conflict with the S. C. Supreme Court. Like *Lopes*, this is a zoning case. This case shares no common ground with *McQueen*. In *Del Monte*, the property owner purchased property known as The Dunes, and immediately commenced the process of seeking the City's approval of development plans. The process was prolonged, and ultimately resulted in a denial several years later. The Court of Appeals for the Ninth Circuit reviewed this matter on appeal from a jury verdict in a section 1983 action. In awarding damages, the jury followed the instructions of the trial judge, which addressed whether the "City's actions must substantially advance a legitimate public purpose" *Del Monte* at 1429. The Court of Appeals affirmed the use of these instructions and the verdict. In dicta, the Court of Appeals discussed that the jury could have also been instructed as to the categorical takings rule set forth in *Lucas*. This dicta certainly does not support an argument that the S. C. Supreme Court is in conflict with the Ninth Circuit Court of Appeals.

Petitioner cites but does not discuss a string of state court decisions. None of them creates a conflict that would warrant this Court's review. In *Kudloff v. City of Billings*, 260 Mont. 371, 860 P.2d 140 (1993), the Supreme Court of Montana quotes from *Lucas, id.*, but then finds the *Lucas* rule inapplicable to the case.

In *McFillan v. Berkeley County Planning Commission*, 190 W.Va. 458, 438 S.E.2d 801 (1993), the West Virginia

Supreme Court cites to the establishment of the categorical rule in *Lucas id.*, but concludes that it is inapplicable to the case. Finally, in *Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528 (1996), and *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730 (1999), the Supreme Court of Wisconsin discussed the categorical taking rule, and found a temporary taking in *Eberle* based on the denial of a permit for a driveway. This case has little in common with McQueen, however, since the Eberles had received approval and then, without warning, lost access to the lot through a change in a zoning ordinance.

There is no conflict between the S. C. Supreme Court's decision in *McQueen, Lucas, id.*, and other courts of last resort. Respondent is aware of no other cases like *McQueen*. No court of last resort has found a taking when a property owner waits fourteen years after the imposition of a regulation to challenge the regulation, and is only affected by the regulation because he allowed the condition of his property to deteriorate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

October 23, 2000

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of
Health and Environmental Control,
Office of Ocean and Coastal
Resource Management, Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity

Opinion No. 25108
Heard February 3, 2000 – Filed April 17, 2000

REVERSED

Mary D. Shahid, of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, of Charleston, for petitioner.

Ronald R. Norton, of Conway, for respondent.

James S. Chandler, Jr., of Pawleys Island, for Amicus Curiae South Carolina Environmental Law Projects.

Glenn Sugameli, of National Wildlife Federation, of Washington, D.C., for Amicus Curiae National Wildlife Federation and South Carolina Wildlife Federation.

BURNETT, A.J.: Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are located on manmade, saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C.Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations, as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking

without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> (2) the property owner had distinct investment-backed expectations; and
>
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen,* 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to *Lucas*. David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-250 et. seq. (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas*, 505 U.S. at 1006-07. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground – a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time

of purchase." *Id.* We do not think this is a valid assumption.[2] Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[ ] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031. We disagree.

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.,* 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee,* 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.,* 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman,* 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct. App. 1984) (citing *Spigener v. Cooner,* 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

In *Carter*, we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "[a]n owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit denial there was a valid exercise of the State's police power to prevent public harm. *Id.* at 204-05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas*. *See, e.g.*, Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 Harv. Envtl. L. Rev. 1, 46 & n.260 (1995) (*Just* is a background principle), Jan Goldman-Carter, Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council, 28 Land & Water L. Rev. 425, 447 & n.138. (1993) (same)[3]; *but see* Joseph L. Sax, Property Rights & the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1440 (1993)

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n.2.

(arguing the *Lucas* Court "repudiat[ed] the conclusion of *Just*"), Richard Ausness, Regulatory Taking & Wetland Protection in the Post-Lucas Era, 30 Land & Water L. Rev. 349, 403-04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the "natural" character of their land.") (citing *Carter, inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state property law that survives *Lucas*.[4] Our opinion in the first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas*

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[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg*, 659 So.2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha*, 538 N.W.2d 538, 534 (Wis. 1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "[n]othing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States*, 39 Fed. Cl. 81, 98 & n.30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059-60 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he thought *Just* fell into the exception carved out by the majority for background principles of state law.

case. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed*, 505 U.S. 1003 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter.*"). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter. Id.* at n.4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just*, the United States Supreme Court repudiated the reasoning of *Just* in *Lucas:*

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, *by requiring land to be left substantially in its natural state* – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

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[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202-04, 314 S.E.2d at 328-29.

Lucas, 505 U.S. at 1018 (emphasis added). The *Lucas* decision made clear the State "must do more than proffer . . . the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."[6] *Lucas*, 505 U.S. at 1031. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas*. *McQueen*, 329 S.C. at 597, 496 S.E.2d at 648.

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central*

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[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed. 1990).

Transp. Co. v. New York City, 438 U.S. 104 (1978), *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), *Mibbs v. South Carolina Dep't of Revenue*, ___ S.C. ___, ___ S.E.2d ___ (1999). Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop. This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor*, 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor*, *Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla.Stat.Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard. *Id.* at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988 allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1368-69.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1369.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be

difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361-62. The court stated that "[w]hile [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed expectations. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 75-76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a

taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we **REVERSE.**

TOAL, A.C.J., MOORE, WALLER, JJ., and acting Justice R. Markley Dennis, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sam B. McQueen, ... Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, ... Appellant.

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity

Opinion No. 2779
Heard December 2, 1997 – Filed January 12, 1998

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Mary D. Shahid, Chief Counsel, S.C. Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (formerly South Carolina Coastal Council), of Charleston, for appellant.

Ronald R. Norton, of Conway, for Respondent.

ANDERSON, J.: Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on manmade, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public

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[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (Supp. 1996).

notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and neighbors wrote to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to

the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1996), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The

master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C. Code Ann. § 48-39-180 (Supp. 1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner,* 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason,* 236 S.C. 158, 113 S.E.2d 544 (1960)). "[T]he substantial evidence standard . . . is the proper standard for review of actions by the Coastal Council." *Id.* at 523-24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.' " *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia,* that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements . . . to act upon applications

within 90 days of the filing." The master noted the significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness, or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter."); *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct.App.1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant*, 319 S.C. 348, 461 S.E.2d 388; *Carter*, 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C. Code Ann. § 48-39-10(J) (Supp. 1996). "Coastal wetlands" means "those areas

based on salt-tolerant vegetation found growing on the lots, *e.g.*, *borrichia frutescens* and *spartina alterniflora*, which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council:* Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "[t]o promote economic and social improvement of the citizens of this State" while "protect[ing] the

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periodically inundated by saline waters . . . and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C. Code Ann. § 48-39-10(G) (Supp. 1996).

sensitive and fragile areas from inappropriate development and provid[ing] adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C. Code Ann. § 48-39-30(1) (Supp. 1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), whereinthe Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 12 Wall. 457, 551, 20 L.Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago,* 99 U.S. 635, 642, 25 L.Ed. 336 (1879). See also *Gibson v. United States,* 166 U.S. 269, 275-276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415, 43 S.Ct., at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.,* at 415, 43

S.Ct., at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct.Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins* 447 U.S., 260; see also *Nollan v. California Coastal*

> *Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra*, 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added).

Id., at 1014-16.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its *Lucas* opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas*.

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The

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[4] In *Carter*, the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas:*

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at

> least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426, 102 S.Ct., at 3171 – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027-1029.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas*, 505 U.S. at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners

ordinarily imports a lack of any common-law prohibition. . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

Lucas, 505 U.S. at 1019.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything with either lot, including park a boat on one. The only use of the land available to McQueen after the permit denials the Council could show was "[r]ecreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the

record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth*, 124 F.3d 632 (4th Cir. 1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs. CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.):

I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner,* 276 S.C. 521, 280 S.E.2d 539 (1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes.

Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall.

The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish."

The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[1]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas*, 505 U.S. at 1006. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007. The United States Supreme Court held Lucas' ability to build on his property was contained in the

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[1] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

"bundle of rights" he acquired when he first bought the property. *Id.* at 1027. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas.*" It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their property. However, McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would

not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright-line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas*, 505 U.S. at 1031. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031 (emphasis added). *See also* 106 Harv. L. Rev. 163 at 272-73 (1992). ("[R]egulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[2]

In *Lucas*, Justice Scalia quoted Lord Coke, who said, "[w]hat is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017 (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st

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[2] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

Am. Ed. 1812)). In 1994, the Federal Circuit of the United States Court of Appeals, interpreting *Lucas* in light of the entire history of regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *See also Property Myths, Judicial Activism, And The Lucas Case*, 23 Envtl. L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, Lucas is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "[t]his lot, by the passage of *time* and *tides* for the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas:* "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031. However, the omitted

phrase reads as follows: "[T]hough changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor.* As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment."

I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become s critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**FIFTEENTH JUDICIAL CIRCUIT**
	)	**Case No. 94-CP-26-3154**
SAM B. MCQUEEN,	)	
Plaintiff,	)	
-vs-	)	**FINAL ORDER**
SOUTH CAROLINA COASTAL COUNCIL, n/k/a SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT,	)	**(Filed March 5, 1996)**
Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made

canals and were created by fill. The lots are Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter came before this court on January 5, 1996, for review pursuant to § 48-39-180, *Code of Laws of South Carolina*. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the United States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are

unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management (hereinafter OCRM), for two permits, one for each lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. § 48-39-150(c), *Code of Laws of South Carolina*. The testimony at the evidentiary hearing, however, reveals that

Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2-24; page 23, lines 18-25; page 24, lines 1-2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2-5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted that Mr. McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corp of Engineers, the S.C. Department of Health and

Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sought review of the OCRM's action "de novo" pursuant to § 48-39-180, *Code of Laws of South Carolina*. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sought to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, § 48-39-30(c), *Code of Laws of South Carolina*, and § 48-39-180, *Code of Laws of South Carolina*,

requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. *The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property Under the Fifth and Fourteenth Amendments of the U.S. Constitution requiring the Payment of Just Compensation.*

Plaintiff, Sam McQueen, is entitled to just compensation pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§ 48-39-30 and 48-39-180, *Code of Laws of South Carolina*. See *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. US 119 L.Ed.2d 561 and rev'd US 120 L.Ed.2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina Coastal Council* (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992 decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme

Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, supra, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13-25; page 20, lines 1-6). Mr. Chinnis confirmed this. (TR page 72, lines 23-25; page 73, lines 1-8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1-6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be

paid to sustain it. The state may not transform private property into public property without compensation." *Lucas*, supra.

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963 before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that . . . the Act is taking nothing."

Lucas, supra, p. 2902. Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, ___ SC ___, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could *not* uncover any such common law principle. *Lucas*, supra.

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property in 1987, after the 1977 Act, and the property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a

three prong test for determining if there has been a regulatory taking.

1. If there was a denial of economically viable use of the property as a result of the regulatory imposition;

2. the property owner had distinct investment-backed expectations; and

3. it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the Panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision to seek a permit is insufficient to conclude that the property owner had no

investment-backed expectations. In addition, the Defendant failed to submit any evidence to support his argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, liens 11-13). The law is clear that a property owner can offer testimony as to the value of his property. The OCRM did not offer any testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, the OCRM did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) If find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as is set forth in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992)

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are

incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth

above, the Plaintiff is entitled to just compensation in the sum of $50,000.000 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this order.

AND IT IS SO ORDERED.

/s/ John L. Breeden, Jr.
John L. Breedan, Jr.
Master in Equity

Dated: Feb. 28, 1996
Conway, South Carolina

'STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) BEFORE THE COASTAL) ZONE MANAGEMENT) APPELLATE PANEL) CC-93-154 and CC-93-155	
Sam McQueen, Appellant, vs. South Carolina Coastal Council, Appellee,	) FINAL ADMINISTRATIVE ORDER	

This matter was before the Coastal Zone Management Appellate Panel for oral arguments on July 28, 1994, in Charleston, South Carolina. Present at this hearing were Ronald R. Norton, Esquire, representing the Appellant, Sam McQueen and Mary D. Shahid, Chief Counsel for Appellee South Carolina Coastal Council.

This is an appeal of Coastal Council staff's denial of permit application numbers CC-93-154 and CC-93-155. The stated purpose of the applications was to construct a bulkhead for erosion control in order to create buildable property at Lot 13, 48th Avenue North and Lot 37, 53rd Avenue North, North Myrtle Beach, in Horry County, South Carolina. This matter was referred to Robert J. Moran, Jr., to conduct an evidentiary hearing and issue findings of fact. The hearing in this matter was conducted on January 21, 1994.

Based on the record before us, including the transcript of the evidentiary hearing, the exhibits, the hearing

officer's findings, and the arguments of all parties, we make the following findings of fact:

1. Sam McQueen is the owner of two separate, non-contiguous lots in the Cherry Grove section of North Myrtle Beach, Horry County, South Carolina.

2. Lot 37, Block Q-1 (herein referenced to as 53rd Avenue lot) was purchased by McQueen in 1961 for $2,500.00. Lot 13, Block L-1 (herein 48th Avenue lot) was purchased by McQueen in 1963 for $1,700.00. Both lots are unimproved and have been so since their acquisition by McQueen. McQueen has paid taxes on these lots since his purchase. They are both valued at $22,500.00 for tax purposes.

3. In 1991 McQueen applied for two permits, one for each lot, the purpose of each being to place a bulkhead and backfill on the individual lots in order to make the lots suitable for building. McQueen's additional stated purpose for the bulkheads is for erosion control, both on his lots and for the benefit of his adjacent neighbors.

4. Both lots are located on man-made, dead-end, salt water canals. Most, if not all, of the other lots on 48th and 53rd Avenues are improved and contain some type of bulkhead or retaining wall.

5. Due to an error in the public notice only one of the initial permit applications was acted upon. On January 21, 1992, a permit was issued for the 53rd Avenue lot, with the special condition that the bulkhead be located no further than seventy-five (75) feet from the front (street side) property line (Appellant's Exhibit 2). McQueen did

not accept the terms of this permit and indicated his intention to appeal.

6. Due to the lack of action on the 48th Avenue lot and the unsatisfactory result of the 53rd Avenue lot permit the parties agreed to resubmit both permits in 1993. They went out on public notice on June 17, 1993.

7. South Carolina Department of Health and Environmental Control, State Ports Authority, and the South Carolina Department of Archives and History voiced no objection to the permits. The South Carolina Wildlife and Marine Resources Department offered no objection "provided the bulkhead is placed against the existing erosional scarp and landward of wetland vegetation." Mr. McQueen's neighbors on 43rd Avenue both requested issuance of the permit.

8. On September 13, 1992, both permits were denied by Council staff. Staff's position was primarily that McQueen's lots had both substantially reverted to wetlands, and that bulkheading would have the effect of creating buildable land by the filling of wetlands.

9. McQueen's grounds for appeal as to both permit denials are contained in an October 6, 1993, letter from his attorney. The thrust of his appeal centers around the following: erosion control on McQueen's and adjacent lots; the lots have existed for many years in their present configuration, these lots were originally man-made, and the bulkhead and fill will only serve to refill a previously disturbed area; adverse effects on the canals from sedimentation; approval under U.S. Army, Corps of Engineers Nationwide Permit, and a total devaluation of the lots amounting to an unconstitutional "taking".

10. Staff's perception of the lots is contained in two drawings which depict the existence of both well established and emergent wetland vegetation.

11. Lot 13 on 48th Avenue is described by the S.C. Coastal Council staff biologist in the evidentiary hearing as a large area of critical area vegetated with borrichia, spartina patens and spartina alterniflora.

12. Lot 37 on 53rd Avenue is described as attaining greater tidal flow than Lot 13, and is at a lower elevation than lot 13. It is unvegetated, filled with brack and other decaying critical area plants. This lot is observed to have tidal inundation reaching from the canal to the road.

13. While these lots differ in description and in terms of vegetation, it is clear that both lots are predominantly critical area.

14. The critical area found at Lot 13 on 48th Avenue is high marsh. High marsh serves the vital function of acting as a buffer and a filter from sediments and pollutants in runoff. This lot also provided a critical area habitat for birds, shellfish, and fish.

15. Lot 37 on 53rd Avenue is unvegetated. Unvegetated sand flat type critical area serve as integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life.

16. This Panel has never quantified or attempted to assign a value to the various critical areas. This appeal is an excellent example of the wisdom of this policy, since the Permit Coordinator for the Council's Myrtle Beach office, the Hearing Officer, and the staff biologist all came

to varying conclusions when they attempted to rank the importance of the critical area functions of these lots.

17. The erosion on these lots started as early as 1974. As late as 1989 this erosion was still not characterized as "severe". McQueen took no action to protect his property from erosion since the time of purchase in 1961 until these applications were initiated.

18. McQueen's neighbors on either side of these lots have bulkheads. They can apply for a permit to construct wingwalls to tie into their bulkheads in order to remedy any erosion caused by the ebb and flow of the tide on McQueen's lots.

Based on these findings we make the following conclusions of law:

1. S.C. Rules and Regulations for permitting in the Critical Area, R.30-12G(2)(a) expressly prohibits the activity sought by these applications.

> The creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes shall be denied.

This regulation expressly prohibits the activity sought by McQueen.

2. The statutory definition of tidelands critical area includes " . . . those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses. . . . "

S.C. Code of Laws § 48-39-10(G). (1976). Therefore, the fact that these lots are adjacent to a salt-water canal which was created by the U.S. Army Corps of Engineers, as raised in Appellant's grounds, is irrelevant.

3. McQueen claims that the action of this agency in denying these permits amounts to a taking. The issue of whether denial of a permit to fill tidelands critical area is a taking was resolved by the S.C. Supreme Court in *Robert W. Carter v. The South Carolina Coastal Council*, 314 S.E. 2d 327 (S.C. 1984). In *Carter* the court held the following:

> Controlling and restricting the filling of wetlands is clearly within the scope of the State's police power, as the legislature enacted the Coastal Zone Management Act in response to its recognition of the detrimental effect the uncontrolled use of coastal wetlands would have on the public welfare . . . the Council's action constituted a legitimate exercise of the State's police power, rather than an unreasonable "taking" of respondent's property.

If a case like *Carter v. South Carolina Coastal Council* was to be brought before the Supreme Court a decade after their decision in *Carter*, we presume that the court will expand its opinion in light of recent takings decisions regarding permits for fill in wetlands. Perhaps the most important of these decisions is *Loveladies Harbor, Inc., et al. v. United States*, ___ F 2d ___, (1994). *Loveladies* contains a three pronged test for determining if there has been a regulatory taking. 1) If there was a denial of economically viable use of the property as a result of the regulatory

imposition; 2) the property owner had distinct investment-backed expectations; and 3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies arose out of a denial of a permit for fill in freshwater wetlands. We believe that the value and functions of tidelands critical area may differ from that of freshwater wetlands. Therefore, we do not concede that *Loveladies* and successive freshwater wetland cases control our disposition of this issue. However, we do find that the Appellant fails to satisfy at a minimum the second prong of the test in that his expectations are relative to the measures he took to protect his investment. The record reflects that the Appellant was on notice of erosion at these lots for several years, and that these lots were buildable as recently as 1989. Appellant failed to act to protect his property.

Therefore, we conclude that Appellant has failed to demonstrate that the action taken by this agency in denying both applications for fill amounts to an unconstitutional taking.

Based on these findings of fact and conclusions of law we find that the action of staff in denying both applications should be upheld.

AND BY A VOTE OF 11 TO 1, THE DENIAL OF PERMIT APPLICATION NUMBER CC-93-154 IS HEREBY UPHELD.

AND BY A VOTE OF 8 T0 4, THE DENIAL OF PERMIT APPLICATION NUMBER CC-93-155 IS HEREBY UPHELD.

AND IT IS SO ORDERED.

/s/ Keith M. Kinard, Chairman
Keith M. Kinard, Chairman
Coastal Zone Management
Appellate Panel
(*formerly South Carolina Coastal Council*)

Charleston, South Carolina

October 7, 1994

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
Clerk of Court
BRENDA F. SHEALY
Deputy Clerk

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May 24, 2000

Ronald R. Norton, Esquire
P O Box 1147
Conway, SC 29528

Re: McQueen, Sam B. v. SC Coastal Council

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied".

/s/ Jean H. Toal C.J.
/s/ James E. Moore J.
/s/ John. Waller, Jr. J.
/s/ E.C. Burnett, III J.

May 24, 2000."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh